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No. _____

In The

**Supreme Court of the United States**

October Term, 1994

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LORNA KREINES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant,

and

JACK MCMENIMEN; WAYNE YAMASHITA,

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 18, 1994

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70 pp

## QUESTIONS PRESENTED

1. In a Bivens[1] action alleging constitutional violations by United States agents acting in their official capacities but sued in their individual capacities, is a prevailing plaintiff entitled to a mandatory fee award under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA") because the action is in essence a civil action against the United States when the United States defends the litigation against the United States officials and pays the judgment.

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[1] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit are those in the caption (C.A. No. 93-15071).

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on August 26, 1994.

## OPINIONS BELOW

A copy of the District Court's unpublished opinion is attached to this petition in the Appendix (App. A). The decision of the Court of Appeals is published at Kreines v. United States, 33 F. 3d 1105 (9th Cir. 1994) and attached to this petition in the Appendix (App. B).

## JURISDICTION

The final judgment of the Court of Appeals was filed and entered on August 26, 1994. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d):

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases

sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

## STATEMENT OF THE CASE

This case concerns the enforcement of the United States Constitution against federal officials who not only violate constitutional rights in the course of their official duties, but who also are defended by the United States in the ensuing litigation, and whose judgment against them is paid by the United States.

In October 1985 the plaintiff, Lorna Kreines, rented a studio apartment in Sausalito, California, appended to her landlord's residence by a stairway and interior door. Two driveways were visible from the street, one leading to the main house at 28 Filbert Street, and one leading to the studios's front entrance with the number "A-28" over

the door.

In January 1986 a special drug task force that included U.S. Customs, the DEA, the FBI, the IRS, and the San Francisco Police Department focused its investigation on Kreines' landlord. Pursuant to a federal warrant, the task force conducted a detailed search of the landlord's residence.

Although Kreines' residence was not covered by the warrant, seventeen agents with guns, a video camera and a drug-sniffing dog invaded Kreines' apartment. An agent pointed a .9 MM automatic pistol at Kreines and put her up against a wall. Kreines immediately informed the agents that she was just a tenant, and showed them her lease with the "A-28" address on it. Nevertheless, the agents detained her for several hours, interrogated her, and searched her residence.

Kreines initially filed a complaint in State court against Doe defendants because she was unable to obtain the names of those responsible for planning, managing, and

participating in the search. The suit was thereafter removed to federal court.

Kreines was unable to learn even the broadest details regarding the responsible agents until she commenced depositions. Within two months after beginning depositions, Kreines moved to amend her complaint to add defendants' true names and her constitutional claims against them.

The United States Attorneys defending the litigation subsequently argued unsuccessfully on three occasions--at the pleading stage, in a motion in limine, and on appeal --that the statute of limitations barred Kreines' constitutional claims because she delayed amending her complaint to add those claims and the agents' true names until after the one-year statute had run.

Kreines' federal complaint sought relief against (1) federal agents under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), for violation of her Fourth Amendment rights, and

(2) the United States under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* for negligence, trespass, assault, invasion of privacy and false imprisonment.

The two actions proceeded to trial simultaneously, with the Bivens suit tried before a jury, and the FTCA action tried by the bench. The jury returned a verdict awarding $14,000 in compensatory damages against two federal agents on the Bivens constitutional claims. On April 19, 1990, the court entered judgment in Kreines' favor. On July 23, 1990, the court entered judgment for the United States on the FTCA claim. Kreines did not appeal the FTCA judgment.

Kreines successfully defended the two federal agents' appeal in the Bivens action on all issues raised. On March 26, 1992, the Bivens judgment was affirmed. Kreines v. United States, 959 F. 2d 834 (9th Cir. 1992). The agents petitioned for rehearing en banc, which the Ninth Circuit denied on July 14, 1992; its mandate was filed August 5, 1992.

Kreines thereafter filed her motion for EAJA attorneys' fees concerning the Bivens action in which she prevailed. On December 17, 1992, the district court denied the attorneys' fees request, ruling that EAJA does not apply to Bivens actions. The court ruled that because a Bivens suit is brought against a federal official in his individual rather than his official capacity, a Bivens action is not a "civil action against the United States" as required by EAJA (App. A).

On January 6, 1993, Kreines filed her notice of appeal of the district court's denial of EAJA attorneys fees. On August 26, 1994, the Court of Appeals affirmed the lower court's decision, ruling that (1) the plain language of EAJA, 28 U.S.C. § 2412(d)(1)(A), states that the underlying civil action must be a "civil action brought . . . against the United States" whereas a Bivens action, brought against federal officials in their personal capacities, is not a civil action against the United States, (2) the EAJA

statutory language is "reasonably clear" so that the Court need not resort to the statute's legislative history, and (3) reviewing the legislative history, while an EAJA fees award in a Bivens action advances the purposes of EAJA, the record is not "definitive" that Congress intended EAJA to apply to Bivens actions. Kreines v. United States, 33 F. 3d 1105 (9th Cir. 1994).

The district and appellate courts applied erroneous legal principles, resulting in injustice that should not be perpetuated.

## REASONS FOR GRANTING THE PETITION

### I. ARGUMENT SUMMARY

This case will determine whether the United States Constitution guarantees rights to all persons--or merely sets forth privileges for the wealthy--when federal agents violate the Constitution. In this case, the jury awarded plaintiff $14,000 for the federal agents' violations of her constitutional rights, a mere fraction of the attorneys'

fees and costs Kreines incurred vindicating her rights through trial and appeal.

A Bivens action is the *sole* means of redressing federal agents' constitutional transgressions. When the United States Supreme Court first acknowledged the Bivens cause of action against federal officials, however, it did not address the issue of awarding attorneys' fees to the prevailing plaintiff, as allowed in parallel state civil rights actions, 42 U.S.C. § 1983, pursuant to 42 U.S.C. § 1988. Without assurance of recovering attorneys fees, only the wealthiest citizens can afford to vindicate their constitutional rights against the vast resources of the federal government.

The district and appellate courts denied Kreines attorneys' fees under EAJA, ruling that her Bivens action was not a "civil action against the United States" required for attorneys' fees under EAJA. The United States, however, could not have been more of a party in Kreines' Bivens action than indeed

it was. The United States, through federal agents acting within the scope of their official duties, violated Kreines' constitutional rights, defended the civil litigation through pre-trial, trial, appeal, and post-appeal fees motions, and paid the judgment on the merits. The United States thus committed the underlying conduct, defended the litigation, and paid the judgment.

This case presents an important question of first impression regarding the interpretation and application of EAJA in Bivens actions. This Court has not ruled whether EAJA fees may ever be awarded in a Bivens action. This Court has thus not ruled regarding the sole issue presented in this petition--whether EAJA attorneys' fees are appropriate in a Bivens action in which the United States defends the litigation and pays the judgment.

This Court has, however, addressed the central issue of this case--to wit, when a civil action is an action against the Government. It has ruled that in certain circum-

stances, a civil action *nominally* brought against government officials in their personal capacities to circumvent the doctrine of sovereign immunity is "in essence" or "for all practical purposes" a civil action against the United States. Stafford v. Briggs, 444 U.S. U.S. 527 (1980); Hutto v. Finney, 437 U.S. 678 (1978); Kentucky v. Graham, 473 U.S. 159 (1985).

In ruling that Kreines' Bivens action was not a civil action against the United States, the Court of Appeals directly contradicted this Court's precedent.

The Court of Appeals' decision also directly contradicts the legislative intent behind EAJA. Congress enacted EAJA "to eliminate for the average person the financial disincentive to challenge unreasonable Governmental actions." Commissioner, I.N.S. v. Jean, 496 U.S. 154, __; 110 S.Ct. 2316, 2321-22 (1990). Because of the prohibitive expense of prosecuting a Bivens action against the vast resources of the United

States, an EAJA fees' award is *essential* to ensure that constitutional rights remain the rights of all persons, and not just a privilege of the wealthy.

The financial disincentive to bringing an action challenging governmental violations of constitutionally-protected rights of individuals is *precisely* the problem Congress sought to remedy when it enacted the attorneys' fees provision of EAJA.

## II. THE COURT OF APPEALS INTERPRETED THE PLAIN LANGUAGE OF EAJA DIRECTLY CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT

The Court of Appeals interpreted the plain language of EAJA "acting in his or her official capacity" directly contrary to United States Supreme Court precedent regarding when a civil action is a "civil action against the United States."

In interpreting a statute, it is fundamental that the first place to look is the statutory language. Stafford v. Briggs, 444 U.S. 527, 535 (1980). EAJA provides for

attorneys' fees "in any civil action . . . brought . . . against the United States." 28 U.S.C. § 2412(d)(1)(A). The United States includes any "official of the United States acting in his or her official capacity." 28 U.S.C. § 2412(d)(2)(C). The statutory language, however, does not specify whether the "official capacity" is the official's capacity during the conduct underlying the civil action, or the capacity in which the official is sued.

The Court of Appeals ruled that the relevant focus is the "nature of the civil action, not the nature of the government actor's conduct." 33 F. 3d at 1107. The Court concluded that because a Bivens action is "an action against individual federal officers," it "simply put" is not a civil action against the United States. Id. at 1107.

This ruling, however, directly contradicts United States Supreme Court precedent that "acting within his or her official capacity" means acting as a Government official,

within the apparent scope of an agent's government employment, not as a private citizen.

In Stafford, in interpreting the same phrase at issue in this action, "acting within his or her official capacity" in a venue statute, 28 U.S.C. § 1391(e), the Court noted that the language made the section:

> applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was *acting* within the apparent scope of his authority and *not as a private citizen.*

Id. at 539 (quoting H.R. Rep. No. 1936, 86th Cong., 2d Sess., 3-4 (1960)) (emphasis added).

The Court of Appeals' ruling thus fails to give effect to the plain meaning of the EAJA statutory language. Bivens actions are based upon conduct by a federal agent "acting within his or her official capacity" as a United States official, not as a private citizen. Official conduct by a United States

official is a necessary predicate for a Bivens constitutional violation. F.E. Trotter v. Watkins, 862 F. 2d 1312, 1318 (9th Cir. 1989). A Bivens action lies on all fours with the plain statutory language of EAJA because the federal agents were government officials "acting" within their official capacities.

## III. THE COURT OF APPEALS INTERPRETED EAJA DIRECTLY CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT DICTATING THAT KREINES BIVENS ACTION WAS "IN ESSENCE" A CIVIL ACTION AGAINST THE UNITED STATES

The Court of Appeals ruled that because Bivens federal officials are sued in their individual capacities, a Bivens action is not an "civil action against the United States" as required by EAJA. Kreines, 33 F. 3d at 1107. This ruling directly contradicts United States Supreme Court precedent defining when an action is considered "a civil action against the United States."

According to this precedent, the controlling factor is not the capacity in which

the Government employee is sued. Stafford, 444 U.S. at 542, n.10. Further, it is irrelevant that the Government entity is not a named party. Hutto v. Finney, 437 U.S. 678, 699-700 (1978).

In determining whether an action is in essence a civil action against the Government, the Supreme Court considers whether the Government (1) actively participated in and defended the civil litigation, Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099 (1985); Hutto, 437 U.S. at 699-700; Stafford, 444 U.S. at 542, and (2) paid the judgment on the merits, Stafford, 444 U.S. at 542, n.10, Graham, 473 U.S. at 163-165, 170.

When the Government actively participates in the civil litigation by defending the employees, and paying the judgment, the Supreme Court rules that the action is "in essence" an action against the Government.

In this case, the Government vigorously defended the federal agents from day one--through pre-trial, trial, appeal, and post-

trial fees motions. The Government further paid the judgment on the merits against the two federal agents. According to Supreme Court precedent, the appellate court decision was erroneous and EAJA fees are appropriate because Kreines' Bivens action was "in essence" against the United States.

### A. THE GOVERNMENT OFFICIAL'S DESIGNATED CAPACITY IN THE CIVIL LITIGATION DOES NOT DETERMINE WHETHER THE ACTION IS IN ESSENCE A CIVIL ACTION AGAINST THE GOVERNMENT

According to United States Supreme Court precedent, the government official's capacity, whether individual or official, at the time of the lawsuit does not determine whether the action is considered an action against the Government. Stafford, 444 U.S. at 542, n.10; Hutto, 437 U.S. at 699-700.

In Stafford, the Supreme Court analyzed the phrase "acting in his or her official capacity" as it appears in a venue statute, 28 U.S.C. § 1391(e). The Supreme Court expressly rejected the argument that the

capacity in which a federal official is sued, individual or official, controls the determination of whether the action is in essence one against the Government:

> In deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling . . . .

444 U.S. at 542, n.10.

The Stafford Court ruled that the phrase "acting in his or her official capacity," depending upon the Government's role in the civil litigation, may sometimes include civil actions only nominally brought against officials in their individual capacities to circumvent the doctrine of sovereign immunity, as in Kreines' Bivens action, and other times, as in Stafford, include civil actions brought against officials in their official capacities. *See* discussion below at II.B.

In its decision, the Court of Appeals ignored Hutto, which supports an EAJA fees award in Kreines' Bivens action. Hutto involved a civil rights action brought under

42 U.S.C. § 1983, the parallel civil rights action against state officials to Bivens actions against federal officials. In Hutto, the issue was whether to assess attorneys' fees pursuant to 42 U.S.C. § 1988 against a state when, as in Kreines' Bivens action, the government (the state) was not named as a party to circumvent the doctrine of sovereign immunity. The civil action was against state agents, sued in their "official capacities."

In awarding fees against the state, the Court did not base its decision on the fact that the state agents were sued in their "official capacities." Instead, the Court ruled that although the state was not a named party, based on the Government's active role in the litigation, the action was "for all practical purposes" against the state and thus awarding attorneys' fees against the state was proper. Hutto, 437 U.S. at 699-700. (*See* discussion below at II.B).

The Court of Appeals' decision is thus erroneous because, as in Stafford and Hutto,

Kreines' nominal designation of the federal agents in their individual capacities does not determine whether her Bivens action is "a civil action against the United States." As in Hutto, based upon the Government's active participation in the case, the action was "for all practical purposes" against the Government. (*See* discussion below at II.B).

### B. BASED UPON THE GOVERNMENT'S ROLE IN THE CIVIL LITIGATION, EAJA FEES SHOULD BE AWARDED BECAUSE KREINES' BIVENS ACTION WAS "IN ESSENCE" AGAINST THE UNITED STATES

Contrary to the Court of Appeals' opinion, in determining whether an action is "in essence" a civil action against the United States, the Supreme Court focuses not on the nominal designation of the Government actors in the civil action, but on the Government's role in the underlying litigation. When the Government actively participates in and defends the civil litigation, and pays the judgment on the merits, the action is deemed "in essence" or "for all practical purposes"

a civil action against the Government. Stafford, 444 U.S. at 542; Hutto, 437 U.S. at 699-700; Graham, 473 U.S. at 162. Under such circumstances, attorneys' fees against the Government are appropriate regardless of whether the Government is a named party or the employee is sued individually.

The rationale for this analysis is obvious. The Government is liable -- whether or not it is a named party -- only in actions that are truly against the Government. As the Supreme Court explained in Stafford, in interpreting the language "acting in his or her official capacity," the intent is to include actions that are "in essence" against the United States. Thus the Court ruled that the phrase "acting in his or her official capacity" could include "actions which are *nominally* against an individual officer but are *in reality* against the Government." 444 U.S. at 542 (emphasis added). Citing to the legislative record, the Court noted:

> Such actions [*i.e.*, lawsuits nominally

> brought against the officer in his individual capacity] are also *in essence* against the United States but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.

Id. at 539 (quoting H.R. Rep. No. 1936, 86th Cong., 2d Sess, 3-4 (1960)) (emphasis added).

In Stafford, the Supreme Court repeatedly referred to the Government's role in the civil litigation in interpreting the phrase "acting within his or her official capacity." As the Court expressly stated:

> In deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling; ***the dispositive inquiry*** is "who will pay the judgment?"

Id. at 542, n.10 (emphasis added).

In its decision, the Court of Appeals misread footnote ten to state "whether the suit seeks a money judgment against the individual, as opposed to the government." Kreines, 33 F. 3d at 1108. The Stafford court focused, however, on *who paid the judgment*, not who was sued for the judgment.

As the Court of Appeals noted, the

United States has discretion to pay the judgment in a Bivens action. 33 F. 3d at 1108. Clearly, if the United States does not pay the judgment (or defend the action), EAJA fees in a Bivens action are not appropriate under Stafford. Such is not the case presently before this Court.

The Court of Appeals also ignored the Stafford Court's emphasis on the Government's role in the civil litigation. In Stafford, the Court stated that *"actions . . . are in essence against the United States" when the "government official is defended by the Department of Justice . . ."* 444 U.S. at 542 (emphasis added).

In Stafford, because the Government employee paid the judgment, the Court ruled that the action was not "in essence" against the United States. 444 U.S. at 544.

In support of its decision, the Court of Appeals incorrectly states that the Court in Stafford held that Bivens actions are not within the scope of the venue statute at

issue in Stafford. Kreines, 33 F. 3d at 1108 (citing Stafford, 444 U.S. at 542-545). The Stafford language on which the Court of Appeals relies merely states the principle that if the government official pays the judgment, the action is not an action against the United States.

This is not the situation in Kreines' Bivens action. In this case, the United States paid the judgment. Under Stafford, when the United States chooses to pay the judgment, it cannot escape fees liability as a non-party.

The Court of Appeals also ignored this Court's decision in Hutto, which focused on the Government's role in the civil litigation and concluded that the action was "for all practical purposes" against the Government such that the Government was liable for attorneys' fees, even though the Government was not a named party in the civil litigation. In Hutto, the State argued against liability for a fee award because the State

was not a named defendant. This Court rejected this argument, stating:

> The Attorney General argues that, even if attorneys' fees may be awarded against a State, they should not be awarded in this case, because neither the State nor the Department is expressly named as a defendant. Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began. The State apparently paid earlier fee awards; and it was the State's lawyers who decided to bring this appeal, thereby risking another award.

437 U.S. at 699-700.

Thus, because the state defended the litigation against the state officials, the Court ruled that the suit was "*for all practical purposes*, brought against the state." Id. (emphasis added).

Similarly, in this case, the actions of the Government (the United States) show that Kreines' Bivens action against the federal agents was "for all practical purposes" brought against the Government (the United States). The United States Attorneys defend-

ed Kreines' action from its inception, through pre-trial and trial. The United States Attorneys' office appealed the jury verdict unsuccessfully to the Ninth Circuit. The United States then paid the judgment against the federal agents. Just as this Court rejected the Attorney General's argument in Hutto, so should this Court reject the United States' same argument against fees in this case because, as in Hutto, this action was "for all practical purposes" a civil action against the United States.

The Court of Appeals' reliance upon Graham to support its decision is misplaced. The Court of Appeals cites Graham for the proposition that "[a] victory in a personal capacity action is a victory against the individual, rather than against the entity that employs him." Kreines, 33 F. 3d at 1107 (citing Graham, 473 U.S. at 167-68). The Court of Appeals thus concluded that Kreines' "personal capacity" suit in her Bivens action is not an action against the United States.

Graham is distinguishable from Kreines' Bivens action, as well as from the parallel state civil rights action in Hutto, because the officials in Graham--in sharp contrast with those in Kreines--were not acting within the scope of their official duties when they committed the offenses there alleged.

The officials in Graham clearly abused their official authority and committed numerous egregious constitutional violations against several residents of a home while seeking a suspect in the murder of a Kentucky State trooper.

The Commonwealth of Kentucky, which was named in the suit for fee purposes under 42 U.S.C. § 1988, investigated the officials' conduct, refused to sanction it, refused to defend the employees, and refused to pay either litigation expenses or the judgment. Accordingly, the Graham Court refused, justifiably, to impose vicarious liability for attorneys' fees on the Government, a nonparty who neither actively participated nor inter-

vened in the litigation. 473 U.S. at 168.

The Graham Court ruled that because the Government played no role in the litigation, neither defending nor paying the judgment on the merits, the action was not against the Government and attorneys' fees may not be assessed against the Government. Id.

This was not the situation in Kreines, nor is it the type of case recognized by this Court in Stafford and Hutto in which the actions against the government employees were "in essence" or "for all practical purposes" against the government, based upon the government's role in the litigation and its payment of the judgment.

The Court of Appeals' decision is thus clearly erroneous because Kreines' Bivens case falls under the rulings and rationale of Stafford, Hutto and Graham. Kreines' Bivens action is a civil action "in essence" and "for all practical purposes" against the United States. The United States committed the underlying constitutional violations,

defended the action and paid the judgment.

## IV. THE COURT OF APPEALS DECISION DIRECTLY CONTRADICTS THE EAJA LEGISLATIVE RECORD

The Court of Appeals decision is further erroneous because it contradicts Supreme Court precedent concerning the role of legislative intent in interpreting statutory language, as well as the EAJA express policies and objectives unequivocally supporting an EAJA fees award in Kreines' Bivens action.

The Court of Appeals ruled that "the statutory language at issue here is reasonably clear" such that review of the legislative record is not necessary. Kreines, 33 F. 3d at 1108. This ruling directly contradicts United States Supreme Court precedent providing that construction of *the same phrase at issue herein* does not end by merely reading literally the statutory words. Referring to the phrase "acting within his or her official capacity," the Court in Stafford stated, "Our analysis does not stop with the language of

the statute; we must also look to 'the objects and policy of the law.'" 444 U.S. at 536. As the Court explained:

> The general words used in the clause . . . taken by themselves, and literally construed, *without regard to the object in view*, would seem to sanction the claim of the plaintiff. *But this mode of expounding a statute has never been adopted by any enlightened tribunal -- because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish.* And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policies of the law.

Id. at 535 (citing Brown v. Duschesne, 19 How. 183, 194 (1857)) (emphasis added).

In this case, the EAJA legislative history leaves no room for doubt that Congress intended EAJA to apply to Bivens actions. In its section-by-section analysis, the House Committee on the Judiciary expressly stated that § 2412(d)(1)(A) "applies to *all civil actions* except those sounding in tort (***but does not exclude Constitutional torts***) and those already covered by existing

fee-shifting statutes." H.R. Rep. No. 94-1418, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4953, 4997 (emphasis added); *see* Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 679 F. 2d 64, 68 (5th Cir. 1982) (constitutional torts not considered part of tort exclusion of § 2412(d), citing above-referenced House Report).

The Court of Appeals dismissed the significance of the express inclusion of constitutional torts in the record, quoting Stafford for the proposition that "the courts are not required to 'treat [] one cryptic sentence as dispositive of the legislative intent." Kreines, 33 F. 3d at 1108 (quoting Stafford, 444 U.S. at 540 n.8).

The Court of Appeals, however, cited Stafford out of context. In Stafford, the Court ruled that "one cryptic sentence" is not dispositive *when it contradicts the legislative record and the legislative intent is otherwise manifest*:

> In the face of the consistently expressed intent of the Committee . . . we decline to treat this one cryptic sentence as dispositive of the legislative intent.

444 U.S. at 540, n.8.

In the instant case, far from contradicting the intent otherwise expressed in the record, Congress' intent to include Constitutional torts in EAJA is fully consistent with Congress' intent that EAJA attorneys' fees are necessary to eliminate the financial disincentives to challenging unreasonable government conduct by government officials acting under color of law.

From the time Congress passed the EAJA attorneys' fees section 2412(d) through the present, the sole vehicle for bringing constitutional tort actions to redress federal officials' constitutional violations was a Bivens lawsuit. Congress passed section 2412(d) in 1981; the Supreme Court recognized Bivens constitutional claims in 1971.

Thus, the only EAJA interpretation upholding Congress' intent for EAJA to apply to

constitutional torts is that in the phrase "acting in his or her official capacity," "acting" refers to the official's capacity when the tort occurred, not the capacity in which the official is sued. Constitutional torts necessarily involve official capacity action (government action must exist for a suit to lie to redress a constitutional tort). As such, Congress directly referred to Bivens actions when it expressly stated that EAJA applies to constitutional tort actions.

As the Court of Appeals recognized, awarding EAJA attorneys fees in Bivens actions advances EAJA's purposes of eliminating the financial disincentives to pursuing persons' rights. Kreines, 33 F. 3d at 1108-09. Interpreting EAJA to apply to Bivens actions such as Kreines' action, which are "in essence" against the United States, is the only way to enforce EAJA's objectives and policy in the constitutional tort arena. Congress passed section 2412(d) specifically

to eliminate the financial disincentives to challenging unreasonable government conduct. Commissioner, I.N.S. v. Jean, 496 U.S. 154, ___; 110 S. Ct. 2316, 2321-22 (1990). Congress passed EAJA to answer concerns that government infringements of citizens' rights would go unchecked because the cost of vindicating these rights is prohibitive.

The instant case illustrates *precisely* the problem Congress sought to remedy. With a small jury award, without EAJA fees, the federal government's violations of a citizen's constitutional rights would go unchecked because those whose rights were violated would be unable to vindicate them if they had to bear the financial burdens of such vindication.

In its report responding to the proposed attorneys' fees section, the House Committee on the Judiciary noted that the Act:

> rests on the premise that certain individuals, partnerships, corporations and labor organizations may be deterred from seeking review of, or defending against unreasonable governmental action because

> of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government.

H.R. Rep. No. 94-1418, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4953, 4984.

After acknowledging that the American rule (that each party is responsible for his or her own fees) embodied in then-existing section 2412 (providing for costs but not fees against the U.S.) was subject only to statutory exceptions, the Committee noted that the EAJA made a "significant change in the existing law regarding attorney fees by establishing a general statutory exception for an award of fees against the Government." Id. at 4987. The need for such a change arose for the following reason:

> The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to discourage or deter litigation. However, in

> many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process.

Id. at 4988. The EAJA

> thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate [or] adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

Id. at 4989.

As the Supreme Court recognized in Commissioner, I.N.S. v. Jean:

> The specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.

496 U.S. 154, ___; 110 S. Ct. 2321-22.

In discussing EAJA, the congressional committee concluded:

> When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. Thus, by allowing

> an award of reasonable fees and expenses against the Government when its action is not substantially justified, [EAJA] provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

H.R. Rep. No. 94-1418, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 4991.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 18, 1994

# APPENDIX

# APPENDIX "A"

## District Court Opinion

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| LORNA KREINES,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES,<br><br>Defendant,<br><br>JACK MCMENIMEN, et al.,<br><br>Defendants. | No. C 87-1410 SAW |

**MEMORANDUM AND ORDER**

I. Background

In October, 1985, Plaintiff rented a studio apartment in a house located at 28 Filbert Street in Sausalito, California. The main house at 28 Filbert Street was owned and occupied by Mr. John Rupp. The apartment, which had a separate street entrance, was downstairs from the main house and connected to it by an interior door which led to a shared storage area.

On January 22, 1986, members of an inter-

agency police task force who suspected Rupp's involvement in narcotics trafficking and money-laundering, executed a warrant to search the premises of 28 Filbert Street. In executing the warrant, several federal agents entered Plaintiff's apartment. Plaintiff immediately showed the agents her lease. The agents interrogated Plaintiff for 45 minutes before they concluded that Plaintiff was not involved in Rupp's alleged activity and permitted her to leave.

In January, 1987, Plaintiff filed a complaint in state court against the United States and various state, individual and Doe defendants. The suit was removed to federal court. After some discovery, Plaintiff amended her complaint to add the names of individual Defendants involved in executing the warrant. The amended complaint sought relief under (1) Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) for violation of her

Fourth Amendment rights;[1] and (2) the Federal Torts Claims Act (FTCA) for negligence, trespass, assault, invasion of privacy and false imprisonment.[2]

Plaintiff's Bivens claim was tried before a jury and her FTCA claim was tired before the court. The jury returned a verdict against Defendants McMenimen and Yamashita, two individual federal agents, on the Bivens claim. On April 19, 1990, the court entered a judgment of $7,000 against each of these Defendants. On July 23, 1990, the court entered judgment for the United States on the FTCA claim.

Defendants appealed the Bivens claim verdict, which verdict was upheld on appeal. Plaintiff now moves for attorneys' fees for

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[1]Because sovereign immunity prevents a plaintiff from suing the federal government for money damages, the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) held that Plaintiffs were eligible for money damages if they sued federal officials in their individual, rather than their official, capacities. Such actions against federal officials in their individual capacities are known as Bivens actions.

[2]Plaintiff also sued Rupp and others in contract and tort for violation of her lease rights. The lease claim was remanded to state court.

time spent by her attorney on the successful Bivens claim.

II. Discussion

Plaintiff moves for attorneys fees under the equal Access to Justice Act, 28 U.S.C § 2412 (d) (1) (A) (EAJA). EAJA provides, in relevant part, ". . . [A] court shall award to a prevailing party . . . fees and other expenses . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412 (d)(1)(A).

Defendants contend that because Plaintiff prevailed in her suit against Defendants McMenimen and Yamashita in their individual, not their official capacities, EAJA does not apply. Defendants' point is well-taken. EAJA is a limited waiver of sovereign immunity which must be strictly construed. See Lane v. United States, 727 F.2d 18, 21-22 (1st Cir. 1984) cert denied, 469 U.S. 829

(1984). It provides for attorneys fees in actions brought "by or against the United States." EAJA defines the "United States" to include "any agency and any official of the United States acting in his official capacity." 28 U.S.C. § 2412 (d) (2) (C).

Plaintiff's successful claims do not fall within the ambit of EAJA. Plaintiff prevailed against Defendants McMenimen and Yamashita in a Bivens action. A Bivens action is a suit for damages "against the employee in his individual rather than his official capacity, and is therefore not a suit against the sovereign at all. Holloman v. Watt, 708 F.2d 1399, 1402 (1983) cert. denied, 466 U.S. 958 (1984). Thus, in prevailing in her Bivens action, Plaintiff has not prevailed in an action "brought by or against the United States" as EAJA defines that phrase. See id. (If suit were against individual defendants as officials of the United States and not as individuals, reliance on Bivens would be misplaced).

Moreover, because the United States was

not a party to Plaintiff's Bivens suit and could not be found liable on the merits for the claims asserted therein, Plaintiff is not entitled to collect attorneys' fees from the United States for legal work performed on that action. See Kentucky v. Graham, 473 U.S. 159, 165, 168 (1985) (There is no fee liability where, because of legal immunity or otherwise, the party from whom fees are sought cannot be held liable on the merits).

Thus, EAJA does not permit Plaintiff to collect attorneys' fees for time spent prosecuting Plaintiff's Bivens claim. Accord, Lauritzen v. Lehman, 736 F.2d 550, 559 (9th Cir. 1984) (noting that EAJA awards are inappropriate in Bivens actions). Because EAJA does not apply, the court need not consider whether the position of the United States was "substantially justified" or whether "special circumstances" rendered a fee award "unjust."

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for Attorneys' Fees is Denied.

Dated: 12/17/1993.

s/Stanley A. Weigel

Judge

# APPENDIX "B"

## Court of Appeals Decision

**Lorna KREINES, Plaintiff-Appellant,**

**v.**

**UNITED STATES of America, Defendant,**

**and**

**Jack McMenimen, Wayne Yamashita, Defendants-Appellees.**

**No. 93-15171**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 17, 1994.

Decided August 26, 1994.

Plaintiff who prevailed on Bivens claim against two federal employees appealed from order entered in the United States District Court for the Northern District of California. Stanley A. Weigel, J., 812 F.Supp 164, denying her motion to recover attorney fees and costs from United States under Equal Access to Justice Act. The Court of Appeals, Goodwin, Circuit Judge, held that Act did not authorize award of attorney fees against United States in Bivens actions.

Affirmed.

United States 50.20, 147(11.1)

Plaintiff who prevailed on Bivens claims against federal employees in their individual capacities could not recover from United States attorney fees and costs under Equal Access to Justice Act, notwithstanding that government had defended its employees in plaintiff's action and had paid adverse judgment against them. 28 U.S.C.A § 2412(d).

Nancy G. Krop, Law Offices of Daniel Robert Bartley, Larkspur, CA, for plaintiff-appellant.

Stephen L. Schirle, Asst. U.S. Atty., San Francisco, CA, for defendants-appellees.

Appeal form the United States District Court for the Northern District of California.

Before: GOODWIN, PREGERSON, and RYMER, Circuit Judges.

GOODWIN, Circuit Judge:

Lorna Kreines appeals from an order denying her post-judgment motion for attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C.

§2412(d) (1988). The district court ruled that because Kreines prevailed in her civil action against two federal officers in their individual capacities, she is not entitled to attorney's fees under the EAJA. Kreines v. United States, 812 F. Supp 164 (N.D.Ca.1992). We have jurisdiction under 28 U.S. C. § 1291, and affirm.

In January 1987, Kreines filed a complaint against the United States and various state, individual and Doe defendants for damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct 1999, 29 L.Ed.2d 619 (1971) for violation of her Fourth Amendment rights in connection with the search of a home in Sausalito, California in which Kreines was renting a studio apartment. She prevailed in her claim against defendants Jack McMenimen, an IRS agent, and Wayne Yamashita, a U.S. Customs agent, and the court entered judgment of $7,000 against each individual defendant. This court affirmed. See Kreines v. United States, 959 F.2d 834 (9th Cir.1992). The

United States paid the $14,000 judgment against the two officers.

After the appeal, Kreines moved the district court for attorney's fees under the EAJA, seeking approximately $242,500 in attorney's fees, and $15,000 in pre-appeal costs. The district court denied this motion. Kreines now appeals that ruling. We review de novo the district court's interpretation of the EAJA. Lauritzen v. Lehman, 736 F.2d 550, 553 (9th Cir. 1984).

Kreines seeks attorney's fees under §2412(d)(1)(A) of the EAJA. That subsection directs the court, except as otherwise provided by statute, to award attorney's fees to a prevailing party in a civil action against the United States, unless the position of the United States "was substantially justified or . . . special circumstances make an award unjust." Id.[1] The EAJA defines the United

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[1]The subsection reads in full:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for

States to include "any agency and any official of the United States acting in his or her official capacity." Id. § 2412(d)(2)(C) (emphasis added).

The district court held that because Bivens actions are claims against federal officials in their individual capacities, they are not "official capacity" claims against the United States. The Court cited our decision in Lauritzen, in which we stated in dicta that §2412(d) does not authorize a fee award in a Bivens action "[b]ecause Bivens actions are against governmental employees in their individual capacities." 736 F.2d at 558 n.10.

Kreines argues that courts should award attorney's fees in Bivens actions under §2412(d) in cases when the government defends its employees and pays any adverse court

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judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412 (d)(1)(A).

judgment against them. She argues that §2412(d)'s plain language, as well as its legislative history and policy underpinnings, require such awards. For the following reasons, we disagree.

1. Plain Language of § 2412(d)

Kreines first contends that the statute's plain language authorizes the award of attorney's fees in Bivens actions. She argues that the word "acting" in the phrase "acting in his or her official capacity," §2412(d)(2)(C), refers to the official's capacity when the tort occurred, not the capacity in which the official is sued. She notes that in order to state a Bivens claim, a plaintiff must show that the relevant officials were acting under "color of federal law." Thus, even though a Bivens claim is brought against federal agents in their individual capacities, she argues that the agents must have been acting in their official capacities within the meaning of §2412(d).

Although this argument is appealing, it

fails under closer scrutiny. First, whether the EAJA applies or not depends on the nature of the civil action, not the nature of the government actor's conduct. The EAJA provides that fees shall be awarded "in any civil action . . . brought by or against the United States." § 2412(d)(1)(a) (emphasis added). Simply put, Kreines' action is not a civil action brought by or against the United States: it is an action against individual federal officers. Second, while the federal officers acted under color of federal law when executing the search warrant, they are liable under Bivens because their actions exceeded the scope of their legal authority. Thus, it cannot be said that the officers acted as agents of the United States, within their official capacity, when they violated Kreines' rights. In Kentucky v. Graham, the Supreme Court explained the difference between individual and official capacity suits:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color

of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against a n entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) (citations omitted). The Court concluded that "[a] victory in a personal-capacity action is a victory against the individual, rather than against the entity that employs him." Id. at 167-68, 105 S.Ct. at 3106.

Kreines argues, however, that although her action was nominally against the individual federal officers, it was in essence against the United States. She cites a footnote in Stafford v. Briggs, 444 U.S. 527, 100 S. Ct. 774, 63 L.Ed.2d 1 (1980), to argue that the "dispositive inquiry in deciding whether an action is "in reality one against the Gov-

ernment," is "who will pay the judgment?" Id. at 542 n.10, 100 S.Ct. at 784 n. 10. She notes that here, the U.S. Attorney's Office provided the legal defense for the officers and the United States government paid the $14,000 judgment on the two officers' behalf.

However, Kreines' reliance on Stafford is misplaced. Stafford addressed the proper interpretation of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e),[2] which was designed to allow nationwide venue in civil actions where the action was "essentially against the United States." Id. at 540, 100 S. Ct. at 782. The Court in Stafford held that Bivens actions, which are individual capacity actions, are not within the scope of §1391(e)'s language. Id. at 542-45, 100

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[2]This provision provides:

§ 1391. Venue Generally

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, . . . [may] be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial party of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action. 28 U.S.C. §1391(e) (emphasis added).

S.Ct. at 783-85. ("A suit for money damages which must be paid out of the pocket of the private individual who happens to be employed by the Federal Government plainly is not one 'essentially against the United States.'"). In the footnote Kreines relies on, the Court explained that in deciding whether an action is in reality against the government, one should look to whether the suit seeks a money judgment against the individual, as opposed to the government. Id. at 542 n. 10, 100 S.Ct. at 784 n. 10. In this case, Kreines' action sought a money judgment against the individual officers. The fact that the United States volunteered to pay the judgment does not change the outcome. The United States is not legally obligated to defend its employees in a Bivens action, nor pay any subsequent judgment. Such payments are wholly discretionary. See 28 C.F.R § 50.15(a).

Furthermore, the Supreme Court in Stafford read the broader language of §1391(e), which covered civil actions against Federal Offi-

cers acting either in their "official capacity or under color of legal authority," as not encompassing individual capacity actions. In light of Stafford, we decline to read § 2412(d)'s more limited language to encompass Bivens actions.

2. Legislative History and Policy Rationale

Kreines next argues that the EAJA's legislative history and underlying policy support her position that attorney's fees should be paid by the government in Bivens actions. She notes that the House Committee n the Judiciary Report states that § 2412 (d)(1)(A) "applies to all civil actions except those sounding in tort (but does not exclude Constitutional torts) and those already covered by existing fee-shifting statutes." H.R.Rep. No. 96-1418, 96th Cong. 2d Sess. 18, reprinted in 1980 U.S. Code Cong. & Admin.News 4953, 4997 (emphasis added). Kreines argues that the sole vehicle for bringing constitutional tort actions to redress federal officials' constitutional violations is a Bivens suit. Thus, Kreines argues that Congress must have

intended §2412(d) to encompass Bivens actions.

We first note that when Congress has expressed itself "in reasonably plain terms," the statutory language "'must ordinarily be regarded as conclusive.'" Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570, 102 S.,Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) (citing Consumer Product Safety Comm'n . GTE Sylvania, Inc., 447 U.S, 102, 108, 100 S.Ct. 2051, 2056, 65 L.Ed.2d 615 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). As we have discussed above, the statutory language at issue here is reasonably clear. In contrast, the reference to "constitutional torts" in the House Report is vague. The words may simply refer to injunction actions against government employees in their official capacity for wrongful or tortious conduct. In any event, courts are not required to "treat [] one cryptic sentence as dispositive of the legislative intent." Stafford, 444 U.S. at 540 n.8, 100 S. Ct. at 782 n.8. We decline

to expand the EAJA's reach to encompass Bivens actions, which are brought against rogue officers who step outside the scope of their official duties, without a more definitive expression from Congress that it intends such a result.

Kreines also argues that awarding attorney's fees in Bivens actions would further the purpose behind the EAJA. Kreines contends that plaintiffs like herself have a disincentive to pursue their rights because the ultimate money judgment is often dwarfed by the cost of attorney's fees. While we might agree that the EAJA's purpose may be advanced by awarding fees in cases such as Kreines', § 2412(d) is not the right tool to achieve this result. As we have discussed a Bivens action is not a "civil action . . . against the United States" within the plain meaning of §2412 (d). And because the EAJA is a limited waiver of the government's sovereign immunity, it must be strictly construed in favor of maintaining immunity not specifically and clearly waived.

Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86, 103 S. Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983); In Re Perry, 882 F.2d 534, 538 (1st Cir. 1989).

3. Analogy to § 1983 Actions

Finally, Kreines argues that a refusal to award attorney's fees in Bivens actions, while awarding such fees in parallel civil rights actions brought under §1983, inequitably favors federal officers over state officers. However, this circuit and others have expressly rejected this argument in the context of §2412(d)'s companion federal fee-shifting provision, §2412(b)[3] and the reasoning of those decisions is applicable here. See Lauritzen, 736 F.2d at 553-54 (attorney's fees under EAJA's § 2412(b) are not available when suit is against federal officers despite analogy to § 1983 and § 1988); Martin v. Heckler, 773 F.2d 1145,

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[3]Section 2412 (b) gives the court discretion to award fees and costs to the prevailing party in a civil action against the United States or any official acting in official capacity when the common law or the terms of a statute specifically provide for such an award against any other party.

1152-54 (11th Cir. 1985) (en banc) (same); Saxner v. Benson, 727 F.2d 669, 673 (7th Cir. 1984) (same), aff'd sub nom. Cleavinger v. Saxner 474 U.S. 193, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985). Moreover, unlike in § 1988, which provides for fees from the actual defendant, the EAJA provides for fees only from the United States, which of course is never a party to a Bivens action.

In sum, we hold that § 2412(d) does not authorize the courts to award attorney's fees against the United States in Bivens action is not a "civil action . . .against the United States" under § 2412(d). For these reasons, the district court's judgment is

AFFIRMED.